No. 89-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WASHINGTON MILLS ELECTRO MINERALS CORP., WASHINGTON MILLS CERAMIC CORPORATION, JOHN T. WILLIAMS and PETER WILLIAMS,

Petitioners,

v.

DELONG EQUIPMENT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent DeLong Equipment Company (hereinafter "DeLong")[1] does not contest Petitioners' (hereinafter "Washington Mills") phrasing of the issue they would have this Court decide. DeLong will show, however, that Washington Mills' issue is not presented by the facts of this case.

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[1] Pursuant to this Court's Rule 29.1, DeLong shows that it has no parent company and no subsidiary.

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STATEMENT OF THE CASE

Pursuant to this Court's standing instruction in its Rule 15.1, DeLong shows that Washington Mills has misstated and omitted material facts. Those facts bear crucially on the issue presented in the petition, and on whether the issue raised would properly be before the Court if certiorari were granted.

The complicated factual record in this case is replete with facts supporting DeLong's Sherman Act allegations, many of which are carefully outlined in the Court of Appeals' opinion. DeLong will not repeat those facts, but will limit its statement in this brief to a general overview of the record and to the specific misstatements or omissions by Washington Mills material to the issue sought to be raised.

First, Washington Mills characterizes this litigation simply as "a dealer termination case under Section 1 of the Sherman Act." (Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (hereinafter "Pet.") at 2.) Washington Mills apparently adopts that characterization in order to capture this Court's interest in light of the recent line of dealer termination decisions culminating in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

The antitrust conspiracy which DeLong alleges, however, is a price fixing conspiracy, not simply a dealer termination conspiracy. The Eleventh Circuit,[2] reversing the District Court's summary dismissal of DeLong's Sherman Act claims, emphasized specif-

[2] The Eleventh Circuit panel consisted of Judge Vance, Judge Anderson, and Senior District Judge Atkins.

ically the overwhelming evidence of a conspiracy to fix prices. (Appendix to Pet. (hereinafter "App.") at 20-34)[3]

Second, Washington Mills seriously distorts the facts in an attempt to state the narrow question it wishes this Court to consider. Key factual issues established by the Court of Appeals, regarding the identity of the products and the nature of the pricing structure at the heart of this litigation, are reargued and misrepresented in the petition. Washington Mills states:

> The three types of ceramic media here involved were designated by Pratt as PMC 3175-1, 3178-1 and 3179-1. Washington Mills called the three products "P&W Specials", and established an initial wholesale price of 85 cents per pound to all of its distributors for any product labeled at the factory as "PMC 3175", "PMC 3178" or "PMC 3179". DeLong contends in this action that the price so established was artificially inflated in order to build a "pad" with which Washington Mills could pay a commission to BCS. (BCS, although having been instrumental in obtain-

[3] DeLong was terminated because of its suspicion of and refusal to go along with the price fixing conspiracy. The District Court erroneously assumed that the focus of the conspiracy was DeLong's termination. The Court of Appeals rectified that error, and correctly focused upon the allegations and evidence of price conspiracy. (App. at 15) The Court of Appeals construed the evidence of termination as supporting its ultimate finding that Washington Mills and its co-conspirators conspired over prices. (App. at 28-32) That termination, however, was not the central object of the conspiracy.

> ing approval of the Washington Mills product by Pratt, could not profit from its efforts because it was located too far from the Columbus, Georgia plant to effectively compete for the new business.).

(Pet. at 3)

This statement suggests that Washington Mills established an innocent wholesale price for a discrete "special" product. The statement further suggests that the putative wholesale price in no way affected the resale price, thus setting the factual stage for the legal question Washington Mills would have this Court consider. Finally, this statement also suggests that the kickbacks to Washington Mills' co-conspirator B.C.S. Company, Inc. (hereinafter "BCS"), a critical element of the pricing conspiracy, were legitimate commissions for work performed.

The facts, as established by the Court of Appeals' *de novo* review, are: The products at issue are not correctly identified as "PW Specials," but are Washington Mills generic stock media, which Washington Mills and BCS sometimes labeled "specials." (App. at 20-22, 42) It is critical to the price agreement issue that the generic and purported special media be understood as identical products.

The initial wholesale price was not 85 cents per pound, but was 49.5 cents per pound (the Washington Mills resale "list" price of 66 cents per pound, less the distributor's 25% discount). The subsequent wholesale price of 85 cents for these products was charged only after DeLong questioned the "special" label. (App. at 21)

Washington Mills did not unilaterally set the wholesale price at 85 cents, but did so in conspiracy with BCS in order to assure that the resale price would be higher than the previous list price of 66 cents. This assured that the resale price for the alleged "specials" provided funding of the kickbacks to BCS and an additional margin from which both BCS and Washington Mills could profit. (App. at 22-25)

The kickbacks to BCS are not properly characterized as "commissions" for services rendered. BCS was fully compensated by Pratt & Whitney Aircraft Division of United Technologies Corporation (hereinafter "Pratt") for any development services that it performed. (App. at 25-27) BCS did not obtain approval of the tested products as Washington Mills products, but falsely identified the products for Pratt's specifications as "BCS" or "PW Specials." (App. at 6-7)

BCS was not prevented by the distance between BCS and Columbus, Georgia from competing fairly for the Pratt business. BCS could have established a local warehouse, as did DeLong and others.

Having responded categorically to Washington Mills' "statement," DeLong provides the following overview of the facts as considered by the Court of Appeals and as relevant to the petition.

The product at issue in this litigation is ceramic media.[4] Washington Mills manufactures media, and DeLong and BCS are media distributors. Pratt is a

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[4] Ceramic media is an abrasive substance used to deburr and polish metal in manufacturing and refurbishing processes. Preformed ceramic media may be purchased in various sizes, shapes, and compositions of clay, all of which can affect the manner in which the media interacts with metal.

major consumer of media. Washington Mills' standard price list for media describes the size, shape and composition of each media product and suggests a resale list price per pound. The three media products involved in this litigation are all standard stock products appearing at one time or another on Washington Mills price lists, identified by their generic description. The resale list price of the media was 66 cents per pound. The wholesale price to distributors was 49.5 cents per pound, 25% less than the resale list price. The identical products have also been identified as "BCS Specials" and "PW Specials" at certain times and sold at different prices. (R.4-80-P.Exs. 4,6)[5]

In the early 1980's Pratt was planning to build a jet engine production plant in New England in which significant amounts of media would be used. BCS suggested that Pratt test certain media for use in the plant, providing Pratt with stock Washington Mills media for testing, but identifying the stock media as "BCS Special." (R. 1-5-Van der Sande Aff. at 7, ¶ 1;

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[5] Each ceramic media product is identified throughout the industry by its size, shape and clay composition. The three media products in this case have appeared as the following standard stock products on the Washington Mills Price Lists at one time or another: "7/8 x 7/8 Tet Pyr," (a 7/8 inch tall by 7/8 inch wide Tetrahedron Pyramid, also sometimes called "PW 5000" and covered by Pratt PMC 3175); "5/8 x 5/8 ACT 25 20," (a 5/8 inch tall by 5/8 inch wide Angle-Cut Triangle at 25 degrees in 20 bond clay, also sometimes called a "PW 6000" and covered by Pratt PMC 3179); and "5/8 x 1/4 ACT 25 20," (a 5/8 inch tall by 1/4 inch wide angle-cut triangle at 25 degrees in 20 bond clay, sometimes also called "PW 7000" and covered by Pratt PMC 3178).

Record citations in this brief are to the record that was before the Court of Appeals.

W.Biebel Aff. at 12; Supp.R.-W.Biebel 2d Dep. at 88-89; 4-80-Neal Dep. at 7-10) Pratt approved this media on three separate specification documents designated PMC 3175-1, PMC 3178-1 and PMC 3179-1. The media approved was identical to stock media described on various Washington Mills price lists. (R.4-80-P.Exs. 4, 6, 73, 74, 165, 206) Washington Mills initially sold this media to BCS at a wholesale price of 49.5 cents per pound, and BCS resold it, labeled "BCS Special," to Pratt at a resale price in excess of 90 cents per pound.[6]

Pratt subsequently announced that it would build its plant in Columbus, Georgia. Pratt representatives invited DeLong to bid on "BCS Special" media. DeLong informed Pratt that BCS was not a media manufacturer and, after examining samples of "BCS Special" media, that it appeared to be standard stock media manufactured by Washington Mills, for which the list price was only 66 cents per pound. (R. 4-80-DeLong Dep. at 11-13)

DeLong sought clarification from Washington Mills regarding the particular media required by Pratt, including the wholesale and list prices. In the meantime, BCS representatives contacted DeLong and suggested that they handle the Pratt media business together, assuring DeLong that there was "plenty of money in it for both of us." (R. 1-1-DeLong Aff. at ¶ 44; 1-23-

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[6] Washington Mills cooperated with BCS by marking the shipping boxes with the BCS labels, "BCS Special" designations, and the necessary Pratt purchasing designations. The media was delivered on plain pallets eliminating any marks identifying the product as Washington Mills media. (R. 4-80-P.Exs. 176, 224-228, 238-241, 257-262; Supp.R.-W.Biebel 2d Dep. at 82; Mahoney Dep. at 12)

DeLong Aff. at ¶ 9; Supp.R.-R.Biebel Dep. at 37-38; W.Biebel Dep. at 84-85; Van der Sande Dep. at 51-52) DeLong declined the BCS offer. DeLong subsequently received a letter from Washington Mills stating that the three media required by Pratt were "specials" labeled PW 5000, PW 6000, and PW 7000, with a wholesale price of 85 cents per pound.

When DeLong continued to object to this pricing and labeling scheme, its distributorship with Washington Mills was terminated. (R. 4-80-P.Exs. 194-197)

Unknown to DeLong, Washington Mills, during this time, was rebating to BCS a portion of the difference between the higher price paid for media labeled as "special" (85 cents) and the list price for the same stock media (49.5 cents).[7] (R. 4-80-Robbins Dep. at 63-66; Supp.R.-R.Biebel at 43-45; 4-80-P.Exs. 178-183, 212-220, 248, 257) This arrangement enabled both BCS and Washington Mills to profit directly from the inflated price and the increased volume of sales.

It is apparent that Washington Mills is trying to impress this Court, as a factual matter, that conspiracy is not the explanation for the agreement between Washington Mills and BCS pursuant to which these secret payments were mailed by Washington Mills to the Bahamas for the benefit of BCS, each time media was sold to Pratt. The Eleventh Circuit resolved this precise fact issue against Washington

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[7] This payment was made to BCS through Wood & Thompson, Ltd., a Bahamian company created and wholly owned by representatives of BCS and to which all of the stock of BCS was transferred. Kickbacks were paid to BCS through this company on all sales of this media to Pratt, whether made by DeLong, Washington Mills or BCS itself.

Mills, for summary judgment purposes. This kickback agreement between Washington Mills and BCS was part of the conspiracy to fix prices. (App. at 25-27)

These facts also belie the assertion that Washington Mills alone "established" the price of this media. Any such contention is flatly contrary to the ruling by the Eleventh Circuit, which found substantial evidence showing that Washington Mills conspired with BCS to increase Washington Mills' sales, through BCS' position with Pratt, at a fixed price enabling Washington Mills to kick back payments to BCS. (App. at 20-32) The difference between unilateral action by a manufacturer and conspiratorial action between a manufacturer and a distributor makes all the difference for antitrust purposes.[8]

Finally, and most importantly, Washington Mills incorrectly represents that the illegal conspiracy focused solely on wholesale, and not resale, prices. Washington Mills asserts that:

> DeLong has never contended (nor is there evidence to support such a contention) that Washington Mills attempted to dictate, maintain, set or fix ***resale*** prices at which the media in question could be resold to Pratt.

(Pet. at 4) (double emphasis in original) This representation is directly contrary to DeLong's allegations and to the ruling of the Eleventh Circuit, which correctly found that the conspiracy concerns resale pricing:

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[8] See pages 15 through 18 *infra* for a discussion of the antitrust implications of conspiratorial, as opposed to unilateral, action.

> DeLong argues that BCS and Washington Mills *conspired and combined* to inflate the price of Washington Mills' standard media by labeling it "special" and charging Pratt a significantly higher price than Washington Mills' *list* price for identical media.

(App. at 20) (emphasis supplied) The Eleventh Circuit recognized that when a manufacturer and a distributor conspire to fix a wholesale price (85 cents per pound for media labeled "special") substantially higher than the previous resale price (66 cents per pound for identical stock media), it necessarily sets the resale price at which the product can be sold. Distributors could not resell media at the price of 66 cents per pound when they were being charged a wholesale price of 85 cents per pound. The entire point of the conspiracy was to fix the resale price to Pratt, and to fix it high enough to permit kickbacks from Washington Mills to BCS.[9] (App. at 25-27)

In short, Washington Mills' representation that DeLong does not allege a conspiracy to fix resale prices squares with neither DeLong's allegations nor the facts demonstrated in the trial court, nor the decision by the Eleventh Circuit.

SUMMARY OF ARGUMENT

DeLong opposes the petition. Not only has Washington Mills failed to show "special and important

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[9] DeLong will also show that, contrary to Washington Mills' argument, an actionable price conspiracy does not require agreement to fix resale prices. See pages 13 through 20 *infra*.

reasons"[10] for granting the writ, but there are substantial reasons to deny the petition regardless of the issue at stake.

This Court should deny certiorari for four reasons. First, Washington Mills has misstated key facts relevant to consideration of its certiorari request. Most importantly, contrary to Washington Mills' assertion, this is not a case in which conspiracy over resale price fixing is absent. Second, there are no "special and important reasons" for review of any issue posed by Washington Mills. Third, Washington Mills has not preserved its issue for review; the question presented here was first raised in Washington Mills' Suggestion for Rehearing En Banc in the Court of Appeals. Finally, review of this action is premature, because unresolved factual and legal issues may prove to be dispositive. This action was remanded for trial, and several claims in addition to the Sherman Act claim at issue here remain pending.

ARGUMENT

I. WASHINGTON MILLS MISSTATES THE FACTS.

Washington Mills misstates material facts. The issue stated by Washington Mills—whether the antitrust laws prohibit only conspiracies to fix resale prices—is not before this Court. As demonstrated in DeLong's Statement of the Case, *supra*, this is not a case in which wholesale prices alone were fixed. Washington Mills also conspired to maintain resale prices. This is not a case in which Washington Mills

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[10] A petition for certiorari "will be granted only when there are special and important reasons therefor." U.S. Sup. Ct. Rule 10.1, 127 F.R.D. 557 (effective Jan. 1, 1990)

stands accused of unilateral action fixing prices. This is not a case posing the issue of whether there was, in fact, a conspiracy. For summary judgment purposes, these factual issues were settled by the Eleventh Circuit, which found evidence of a conspiracy to fix wholesale and resale prices. This Court is not the place to retry issues of contested fact. See, *e.g.*, *United States v. ITT Cont. Baking Co.*, 420 U.S. 223, 226-27 n.2 (1975); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951).

II. THIS ACTION RAISES NO "SPECIAL AND IMPORTANT" ISSUES.

A. Washington Mills Conspired Over Resale Prices.

This case does not present the sole issue which Washington Mills would have this Court consider. Fixing resale prices was very much part of the conspirators' purposes.

The best Washington Mills might argue is that it conspired to set no exact resale price. But lack of precision is no defense against charges of an illegal conspiracy to fix prices. Conspirators need not set an exact price in order to bring themselves within the *per se* prohibition. A price conspiracy is a conspiracy over "price *or price levels.*" *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 736 (1988) (emphasis supplied). This Court has long recognized that:

> An agreement to pay or charge rigid uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used . . . . They are fixed because they are agreed upon.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940).

DeLong has shown facts revealing a conspiracy to fix resale price levels. As the Eleventh Circuit held, the essence of this conspiracy was "charging Pratt a significantly higher price than Washington Mills's list price for identical media." (App. at 20) Raising wholesale prices was merely a device to raise the price to Pratt. Specifically, the wholesale price was raised above the previous resale price of identical product, thereby forcing up the resale price level.

This Court should deny certiorari because DeLong alleges and shows a conspiracy over resale prices, quite to the contrary of Washington Mills' representations.

B. Resale Price Maintenance Is Not a Necessary Element of a *Per Se* Price Conspiracy.

Even if, *arguendo*, the record did not support a finding of an illegal conspiracy to fix resale prices, despite the substantial evidence to the contrary, this Court should deny certiorari. The issue whether resale price maintenance is a required element of a vertical price conspiracy is not an issue worthy of this Court's writ of certiorari.

Discretionary review ordinarily is granted only in the circumstances specified in Rule 10.1: (1) "conflict with the decision of another United States court of appeals on the same matter;" or (2) decision on "an important question of federal law which has not been, but should be settled by this Court;" or (3) "conflict[ ] with the applicable decisions of this Court." None of these grounds is satisfied here.

In an attempt to assemble a colorable petition for certiorari, Washington Mills has cobbled together certain dicta arising from fact situations which are irrelevant to this litigation: (1) cases in which the plaintiff failed to make out a standard element of an antitrust claim (usually the existence of a conspiracy) quite apart from the resale price maintenance issue; (2) cases in which the plaintiff demonstrated conspiracy, but not a conspiracy over price; and (3) cases not depending upon conspiracy at all, but rather attempting to show a Sherman Act section 1 "combination" created by a manufacturer's unilateral efforts. Each instance is manifestly different from the present litigation.

1. Washington Mills Shows No Conflict with Decisions of This Court.

Despite Washington Mills' general assertion that the Eleventh Circuit decision is in conflict with decisions of this Court, this Court has never held that a Section 1 vertical price conspiracy requires conspiracy over resale prices.

The holdings of all of the decisions cited by Washington Mills (Pet. at 8) are discussed in *Business Electronics, supra*, 485 U.S. at 724-33. *Business Electronics* carefully points out that none of those prior decisions holds resale price maintenance to be a required element of a vertical price conspiracy. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977),

> refused to extend *per se* illegality to vertical nonprice restraints, specifically to a manufacturer's termination of one dealer pursuant to an exclusive territory agreement with another.

Business Electronics, 485 U.S. at 724. *GTE Sylvania* thus had nothing to do with price conspiracies. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), merely "addressed the evidentiary showing necessary to establish vertical concerted action." *Business Electronics*, 485 U.S. at 726. Finally, *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400, 405 (1911), held that a resale price maintenance agreement was *per se* illegal, but did not hold that a vertical price conspiracy required agreement on resale price. *See Business Electronics*, 485 U.S. at 733.

Moreover, *Business Electronics* itself requires no showing of resale price maintenance. This Court's holding is "that a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." *Id.* at 735-36. This conclusion notably omits mention of a distribution or resale level. The only references to resale price maintenance in the *Business Electronics* decision are in the context of the *Dr. Miles* opinion, in which resale price maintenance was the plaintiff's own chosen theory of antitrust liability.

Business Electronics limits the price-effect inferences which the Court will draw from conspiracy to terminate a price cutter. *Business Electronics*, 485 U.S. at 726-28. This is not such a case. Here the trial and appellate courts were required to draw no inference about the effect of other actions (such as dealer termination) on prices. As the Eleventh Circuit concluded, DeLong presented substantial evidence that Washington Mills and BCS, in fact, conspired over prices.

Naked vertical price fixing has been a *per se* violation of the Sherman Act since its enactment and

certainly since *Dr. Miles*, *supra*. No subsequent decision of this Court has shaken or varied this fundamental proposition. Most importantly, no decision of this Court holds that price fixing is a *per se* violation only in cases of resale price maintenance.

In the absence of decisions by this Court, Washington Mills looks elsewhere for help. Its only authority for its proposition is dicta quoted from Professor Areeda. Washington Mills quotes Areeda to the effect that "a wholesale price or any general change in it is not a 'price fix' . . . otherwise every wholesale price would be illegal—an obviously senseless result." (Pet. 13)

Penalizing a manufacturer's unilateral price determinations would indeed be a "senseless result." But Washington Mills' invocation of Areeda's language ignores

> the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed.

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).[11]

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[11] Professor Areeda himself did not ignore the distinction between unilateral conduct and conduct by agreement. 8 P. Areeda, *Antitrust Law*, § 627a. at 317 (1989).

The Sherman Act avoids Areeda's "senseless result" by allowing manufacturers to set their own price policies. But when manufacturers conspire with their distributors to fix prices to competing distributors, they run afoul of the antitrust laws. *Monsanto* went to great length to emphasize "that independent action by the manufacturer . . . be distinguished from price fixing agreements." *Id.* at 763.

In summary, the decisions of this Court do not stand for the proposition that a Sherman Act price conspiracy requires resale price maintenance. *Accord* R. Bork, *The Antitrust Paradox* 167-79 (1978).

2. Washington Mills Shows No Conflict with Decisions of Other Courts of Appeals.

Washington Mills fares no better in showing that the Eleventh Circuit decision is contrary to those of other circuit courts. Washington Mills' cited decisions concern issues other than resale price maintenance. None stands for the proposition that resale price maintenance is an indispensable element of a vertical price conspiracy.

Several circuit courts have rejected antitrust claims for failure to demonstrate a conspiracy, under the test announced in *Monsanto*.[12] Those decisions are not helpful here, where the Eleventh Circuit has ruled that DeLong has shown facts sufficient to compel trial of the conspiracy issue.

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[12] Falling in this category are all of the following decisions cited by Washington Mills: *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *National Marine Elec. Distribs., Inc. v. Raytheon Co.*, 778 F.2d 190 (4th Cir. 1985); *Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184 (9th Cir. 1984).

A second group of circuit court decisions explicitly turns on a very similar issue: whether the plaintiffs showed evidence of a manufacturer induced "combination" to fix prices. In *Dr. Miles*, this Court held that resale price maintenance is a *per se* violation of the Sherman Act. In order to establish a prima facie case, however, a plaintiff must show "[p]roof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result . . . ." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 224.

Ever since *Socony-Vacuum*, this Court and the lower courts have struggled with the narrow issue of what constitutes such a "combination." In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), this Court resolved that a *per se* prohibited Section 1 vertical combination need not involve mutual agreement. "[B]y virtue of concerted action induced by the manufacturer," the manufacturer may become "the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act." *Id.* at 47; see also *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (*Parke, Davis* analysis applied to consignments).

Trailing in the wake of *Parke, Davis* has come a flotilla of decisions addressing the limited question of what manufacturer coercion, or other unilateral conduct, is sufficient to create a "combination" for Sherman Act Section 1 purposes. Most of the remaining decisions cited by Washington Mills fall within this category.[13] Those cases are irrelevant here. Washing-

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[13] In this category fall *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 258-59 (3d Cir. 1984), *cert. denied*,

ton Mills engaged in more than unilateral conduct. DeLong has shown facts supporting the proposition that Washington Mills and BCS entered into an express conspiracy and agreement to fix prices. (App. at 20-32)

A handful of decisions in a third group, unlike those in the first two groups, do not rely expressly upon *Monsanto* or other controlling decisions of this Court. Yet all of the decisions in this group are also controlled by this Court's rulings on issues other than resale price maintenance.[14]

After these three groups of cases are excluded from Washington Mills' list of citations, only two court of

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471 U.S. 1016 (1985); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982); *Carlson Mach. Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1260-61 (5th Cir. 1982); *In re Coordinated Pretrial Proceedings*, 691 F.2d 1335, 1343 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979); *Butera v. Sun Oil Co.*, 496 F.2d 434 (1st Cir. 1974); *Kellam Energy, Inc. v. Duncan*, 668 F.Supp. 861 (D.Del. 1987); *Taggart v. Rutledge*, 657 F.Supp. 1420, 1440-42 (D.Mont. 1987), *aff'd*, 852 F.2d 1290 (9th Cir. 1988); *Mowery v. Standard Oil Co. of Ohio*, 463 F.Supp. 762 (N.D.Ohio 1976), *aff'd*, 590 F.2d 335 (6th Cir. 1978).

[14] This list includes *McCabe's Furn., Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) (anticipates *Business Electronics* by finding no *per se* claim where the plaintiff demonstrated only dealer termination, without a showing that the parties fixed the resale price or price level of the surviving dealer-conspirator); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 707-08 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (no showing of common purpose or design as required by *Monsanto*; and by *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 343 (9th Cir.), *cert. denied*, 464 U.S. 820 (1983) ("coercion" absent).

appeals decisions remain. Neither decision is in conflict with the Eleventh Circuit decision in the present litigation.

In *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988), the plaintiff charged its supplier with a *per se* resale price maintenance violation, under the theories of *Dr. Miles* and *Simpson v. Union Oil Co.* In that context, the Eighth Circuit noted:

> The plaintiff must produce evidence that is "sufficient for the jury to determine not merely that the manufacturer . . . conspired, but that . . . [it] conspired *to maintain resale prices.*"

Id. at 1228 (citing *McCabe's Furniture, supra*) (emphasis added by *Ryko* court). That language makes sense in context: if a plaintiff's theory is based upon resale price maintenance, a showing of conspiracy to maintain resale prices is required. But if a plaintiff does not rely upon allegations of resale price maintenance, it is not required to show a conspiracy to maintain resale prices.

Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440 (3d Cir. 1978), is the final decision on Washington Mills' list. *Sitkin* was a bid-rigging case, in which the buyer agreed to violate closed bid rules and assured a potential seller the contract if it would match the best competitive bid. The Third Circuit held in that context:

> The price-fixing within the scope of the per se prohibition of § 1, however, is an agreement to fix the price to be charged in trans-

> actions with third parties, not between the contracting parties themselves.

Id. at 446.[15] *Sitkin* too is irrelevant to the present litigation. Washington Mills and BCS conspired to set not only the price between themselves (reduced by the alleged kickbacks), but also Washington Mills' price to DeLong and to other distributors. (App. at 20-21)

In a nutshell, Washington Mills' arguments for a resale price maintenance standard are unsupported except by dicta. Most of those dicta are drawn from situations in which a resale price maintenance test makes sense: (1) cases involving a manufacturer's unilateral imposition of price restraints, in which the *per se* theory applies, if at all, only where resale price maintenance is demonstrated, see, *e.g., Parke, Davis, supra*; *Simpson v. Union Oil Co., supra*; *Mesirow v. Pepperidge Farm, Inc., supra*; *Carlson Mach. Tools, Inc. v. American Tool, Inc., supra*; and (2) cases in which the plaintiff explicitly alleges resale price maintenance to be the central object of a conspiracy between the manufacturer and another. See, *e.g., Dr. Miles, supra*; *McCabe's Furniture, supra.*

DeLong presented facts supporting a claim of conspiracy between a manufacturer and a distributor to fix the wholesale price of goods to DeLong and other

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[15] See also 8 P. Areeda, *Antitrust Law*, at 261 (1989) ("*Dr. Miles* is again inapplicable because the price term covers nothing . . . that is being resold.") As Areeda implies, this is different from the present case, in which the product is resold.

competing distributors. Those facts support classic allegations of a vertical conspiracy, over price.[16]

C. Washington Mills Presents No Important Question of Law Which Should Be Settled by this Court.

Washington Mills also fails a third test for this Court's grant of the writ. This litigation presents no compelling issue of law demanding this Court's resolution.

DeLong has demonstrated that this is not a case in which resale price maintenance is absent. For that factual reason alone, this case is not the vehicle for deciding the issue framed by Washington Mills.

Even assuming *arguendo* that this litigation involved price restraints only on the wholesale market, it still lacks the importance required for Supreme Court review. Only a rare price conspiracy case is likely to involve agreement to restrain prices in the wholesale market, without either some further agreement regarding resale prices or substantial effect on the resale market. The entire argument of Washington Mills is, therefore, without significant practical importance.

This Brief in Opposition has highlighted issues of vertical price fixing analysis, other than the issue raised by Washington Mills, which one day may merit this Court's attention. For example, this Court's *Monsanto* decision may call into question that strain of

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[16] DeLong stresses again that this argument assumes *arguendo* a lack of evidence of resale price maintenance. But the Eleventh Circuit properly found sufficient evidence to require trial on DeLong's allegations that Washington Mills conspired with BCS to fix not only the wholesale price to DeLong and other competing distributors, but also the resale price level. (App. at 20)

price-fixing cases acknowledging Sherman Act "combinations" created by unilateral action of a manufacturer. See, *e.g.*, *Simpson v. Union Oil Co.*, *supra*; *Parke, Davis*, *supra*. While *Monsanto* did not address whether the *per se* test still covers vertical "combinations" other than conspiracies, the *Monsanto* Court clearly held that a Section 1 conspiracy requires "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764. Because the *Parke, Davis* and *Simpson* approaches do not require a "common scheme," this Court may one day wish to reconcile these decisions with *Monsanto*.

The instant litigation, however, presents neither the "combination" issue nor any other significant issue. The Eleventh Circuit found classic evidence in support of a conspiracy, a common design between Washington Mills and BCS to fix prices. Because of its factual finding, the Eleventh Circuit's decision falls directly in line with the decisions of this Court.

III. WASHINGTON MILLS' ISSUE WAS NOT RAISED SUFFICIENTLY BELOW.

Washington Mills has not preserved for this Court's review the issue it now presents. Specifically, Washington Mills now raises an issue which it failed to offer for consideration by the Court of Appeals until after initial briefing, after oral argument, and after decision on the merits.[17]

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[17] Those pages of Washington Mills' Court of Appeals brief which deal in any way with the Sherman Act *per se* arguments are reproduced in an appendix to this brief, for the Court's convenience. Nowhere in its panel brief did Washington Mills argue the legal proposition that a price conspiracy is lawful absent resale price maintenance.

The argument presented here was raised below for the first time in Washington Mills' Suggestion for Rehearing En Banc, too late for the Court of Appeals panel to give the issue plenary consideration. This Court ordinarily does not grant certiorari to consider issues which were not properly preserved below. See, *e.g.*, *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.13 (1976).

IV. SUPREME COURT REVIEW OF THIS ACTION IS PREMATURE.

This case is not ripe for review. The Eleventh Circuit remanded to the district court. (App. at 48) "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

Two separate concerns make Supreme Court review premature. First, this action may yet be resolved below on factual grounds, in that no trial on the merits has been held. Second, this action may be resolved on alternative legal grounds, quite apart from that raised in the petition.

A. The Facts of this Action Are Not Yet Resolved.

The need for this Court's review may be obviated by a trial. No finder of fact has explored the evidentiary bases for DeLong's claims.

This appeal is from final judgment only in the most technical of senses. Initial appeal was filed after entry of partial summary judgment in favor of Washington Mills, followed by final judgment on less than all claims, under Fed.R.Civ.P. 54(b). The District Court

thus permitted Court of Appeals review before disposition of those issues which survived the summary judgment motion. The effect of the Eleventh Circuit's remand simply is now to permit trial on all of DeLong's claims.

An examination more stringent than that contemplated by Rule 54(b) must be undertaken, now that this Court is asked to include the present action among the precious few to which it can give attention on the merits, and now that summary judgment has been overruled. The Rule 54(b) "final" judgment has now been reversed; this action is now subject to trial on the merits and subsequent review. Thus, the present petition carries a heavy presumption against immediate review by this Court. The writ of certiorari is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

B. Washington Mills' Issue May Not Dispose of This Action.

Further, this petition is premature because Washington Mills' Sherman Act issue may not prove to be dispositive. At each stage of this litigation unresolved issues have been left hanging. Resolution of those issues may avoid the need for ruling on the single Sherman Act issue raised in the petition.

The Eleventh Circuit reinstated for trial not only the Sherman Act claim, but also DeLong's claims of

price discrimination under the Robinson-Patman Act.[18] (App. at 37-42) The pendency of the Robinson-Patman claims makes certiorari regarding the Sherman Act claim premature. This is especially clear because of the similarity of Sherman Act and Robinson-Patman Act claims, both of which ultimately seek treble damage relief under section 4 of the Clayton Act, 15 U.S.C. § 15. After trial, DeLong may well be awarded damages solely under the Robinson-Patman Act,[19] or may receive parallel relief under both statutes. In either event, no purpose would be served by the further interlocutory appeal which Washington Mills now proposes.

Because the Eleventh Circuit has ordered that the factual issues in this action be tried, and because the question presented is not dispositive of this litigation, certiorari is premature.

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[18] The Eleventh Circuit also reversed summary judgment, and remanded for trial, on an issue of common law fraud. (App. at 46-47)

[19] Still other Robinson-Patman claims survived summary judgment, were never appealed, and remain pending in the District Court. The trial court convened a jury trial as to these issues, but granted a directed verdict against DeLong. DeLong has now moved for a new trial, arguing in part that the grounds for the directed verdict were rejected in the Eleventh Circuit's subsequent decision on the Robinson-Patman issues, on this appeal. The District Court has withheld ruling pending this Court's action on this certiorari petition. Thus still additional Robinson-Patman issues remain pending which may dispose of this litigation as a practical matter, or which may still be appealed.

V. CONCLUSION

Because certiorari is premature; because the issue which Washington Mills now urges was not preserved below; because the facts do not support review of the issue pressed by Washington Mills; and because Washington Mills has not satisfied any of the grounds for certiorari; the writ should be denied.

This 27th day of March, 1990.

Respectfully submitted,

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APPENDIX

APPENDIX A

Excerpt from
Brief of Appellees Washington Mills et al.

U.S. Court of Appeals
for the Eleventh Circuit

Case No. 88-8664

II. DELONG PRODUCED NO SIGNIFICANT PROBATIVE EVIDENCE OF ANY VIOLATION OF THE SHERMAN ACT

In *Monsanto v,. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 79 L.Ed.2d 775 (1984), the Supreme Court outlined the proper procedural analysis for a district judge to follow in addressing a distributor-termination case under the anti-trust laws as follows:

> This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. First, there is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. Section 1. Independent action is not prescribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L. Ed. 992 (1919); ct. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960). Under *Colgate*, the man-

> ufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturers demand in order to avoid termination.
>
> The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on non-price restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-409 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

465 U.S. at 760.

The Supreme Court subsequently followed and elaborated on the teaching of *Monsanto* in *Business Electronics Corporation v. Sharp Electronics Corporation*, 485 U.S. ___, 108 S.Ct. 1515, 99 L. Ed. 2d 808 (1988), holding that a vertical restraint of trade is not per se illegal under Section 1 of the Sherman Act unless it includes some agreement on price or price levels. Accordingly, consistent with the Supreme Court's instruction in *Monsanto* and *Sharp* and with that of this circuit in *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987) and *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988), the trial properly considered (1) whether there was evidence that the action complained of was concerted rather than independent; (2) whether the alleged restraint was price rather than non-price in nature of purposes of determining whether to apply the rule of reason rather than a per se rule; and (3) whether plaintiff

had met its burden of establishing a threshold showing of a violation under the rule of reason analysis.

A. There Is No Probative Evidence of "Concerted" Action Between Washington Mills And Others.

Although the trial judge assumed for purpose of ruling on the motion for summary judgment that DeLong had adduced sufficient evidence of joint action, the record is devoid of any evidence which would have excluded the possibility of independent action which is necessary to escape summary judgment under the dictates of *Monsanto* and *Matsushita*.

The unrefuted evidence is that no one related to Washington Mills even discussed the termination of DeLong with any third party until *after* the termination. [R. 3-38 - P. Williams Aff. Para. 15, 16; J. Williams Aff. p. 13, 14]. In addition, there was no evidence that there was any agreement, express or implied, with any other distributor regarding the retail price of Washington Mills products, either in connection with the termination of DeLong or otherwise. There was no evidence of any effort to establish a retail price or price levels, and no evidence to in any way relate the termination of DeLong to "enforcement" of retail prices.

The only evidence remotely touching upon alleged involvement by other distributors in the termination of DeLong was evidence that, prior to DeLong's termination, other distributors (not BCS) complained to Washington Mills that DeLong was undercutting their prices and the fact that one distributor located in Alabama expressed the view that DeLong should be terminated.

As the Supreme Court made it clear in *Monsanto* and *Sharp*, however, mere evidence that other distributors complained about the plaintiff's low prices, (or, indeed, that other distributors wanted the plaintiff terminated) is insufficient to exclude the possibility of independent action.

> [S]omething more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."
>
> . . .
>
> The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. *It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.*

Monsanto, supra, 465 U.S. at 764 (emphasis added). *See also Sharp, supra; Commuter Transportation Systems, Inc. v. Hillsboro County Aviation Authority*, 801 F.2d 1286, 1291 (11th Cir. 1988) (a plaintiff seeking damages for antitrust violation must present evidence that excludes the possibility that the alleged conspirators were acting independently); *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988).

There is no such evidence in the present case. The only pieces of evidence DeLong points to are "two letters" from other distributors and "a handwritten note" allegedly from a WM officer recording a telephone call from a competing distributor complaining of DeLong. (*See* Appellant's Brief, p. 38). Only one letter, Pl. Ex. 88, is actually identified in DeLong's brief. Exhibit 88, however, merely asserted a complaint that DeLong was "talking out of both sides of

his mouth", was soliciting business in Alabama at reduced prices, and expressed the view that DeLong should be terminated. There is no evidence that Washington Mills invited the letter and no implication that any pressure would be brought on Washington Mills if it did not terminate DeLong. *See* R. 4-80-Pl. Ex. 88.

The supposed handwritten note regarding a telephone call is even less probative. While not entirely legible, Ex. 93 appears to reflect a call from a dealer who wanted to become a Washington Mills distributor, not one who was a distributor. The information relayed from this caller did not deal with a pricing complaint. It merely advised that DeLong was pushing products of another maunfacturer and only sold Washington Mills products when he had no other choice. (R. 4-80-Pl. Ex. 93).

Neither of these communications together with any other evidence tends to prove that Washington Mills and any one or more of its distributors "had a conscious commitment to a common scheme designed to achieve an unlawful objective" (*Monsanto, supra*, 465 U.S. at 764), nor do they support a conclusion that "both . . . the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.*, n. 9. Indeed, to hold that a conspiracy could be inferred from such complaints would directly contravene the Supreme Court's holding in *Monsanto*:

> [T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. . . . Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that the termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. As Monsanto points out, complaints about price cutters

> "are natural and from the manufacturer's perspective, unavoidable reactions by distributors to the activities of their rivals."

Monsanto, 465 U.S. at 762-763.

Accordingly, because DeLong presented no probative evidence of a conspiracy, summary judgment was properly entered on the Sherman Act claims.

B. The Alleged Restraint Was Non-Price in Nature.

The trial court correctly found that there was no evidence of an agreement between BCS and Washington Mills to *directly* fix the price of media. [R. 5-95-11]. The unrefuted evidence was that Washington Mills made no attempt to establish or to control the resale prices of any of its distributors. Thoses prices were set by the distributors themselves, including DeLong.

The wholesale price for the Pratt & Whitney special products (and all other products of Washington Mills) was, as is, determined by Washington Mills alone. [R. 3-38-J. Williams Aff. at Par. 5; Van Der Sande Aff. at Par.14; J. Williams Dep. at pp. 13, 20-21f]. There is no evidence that Washington Mills and BCS (or anyone else) "conspired" or "agreed" on what price Washington Mills would charge for its products.

There is no evidence of any effort by Washington Mills to establish the retail prices at which the distributors sold the product to end users. There is no testimony that Washington Mills has anything to do with the prices at which its distributors sell. Indeed, DeLong's own sales representatives have testified that Washington Mills never told DeLong what it had to charge on the retail level, and that DeLong determined its own prices.

> Q. . . . What's true is that Washington Mills, during the entire time that you bought media from them, did not dictate or tell you what you had to charge to a customer of yours?

A. That's true.

Q. You're free to determine that yourself.

A. That's true.

[R. 4-80-Dickey, Dep. at pp. 78-79; Weed, Dep. at p. 16]. Thus, DeLong's own evidence negates any inference of an illegal restraint on resale price which would result in a per se rule.

The sum total of DeLong's contention on this appeal regarding an alleged "price conspiracy" is as follows:

> Defendant WM and former Defendant BCS, a competing distributor, conspired to fix the price charged DeLong for media intended for Pratt, by (a) further conspiring with Pratt to concoct a false labeling system for media available generically; (b) pegging the price charged DeLong at a percentage of retail (R. P. Ex. 109 and 110); and (c) frustrating DeLong's attempts to acquire Pratt media at the lower generic price by continuing to represent to DeLong that Pratt media were indeed 'special' (R. 4-80-DeLong Dep. at 12-13; P. Ex. 10. This was a price conspiracy.

Appellant's Brief, at 36. This contention is fatally flawed both factually and logically.[4]

(1) There Was No Evidence Of A Vertical Price Conspiracy

In the first place there is absolutely no evidence that BCS either knew of or participated in the setting of the wholesale price to DeLong. The unrefuted evidence is that Washington Mills and it alone, determined the wholesale

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[4] The assertion that Pratt was a co-conspirator in the alleged scheme to "concoct a false labeling system" is rather bizarre. DeLong does not explain why Pratt would want to participate in such a scheme so it could pay a higher price.

prices of its media. [See 3-38 J. Williams Aff., para. 5; Van Der Sande Aff., at para. 14; 4-80-J. Williams Dep. at p. 13, 20, 21.] Pl. Ex. 109 & 110 cited by DeLong are totally unrelated to the pegging or setting of any prices. Each is a listing of distributors with no pricing information at all. Ex. 110 is for a period after the termination. DeLong is not mentioned at all. Ex. 109 lists DeLong as a Georgia distributor with the notation "Sp. quote".

The assertion that Washington Mills and BCS conspired with Pratt to concoct a false labeling system is not only disengenius but egregiously so. See the statement of facts, supra, "Media manufactured by Washington Mills for Pratt & Whitney" and "The Non-Relationship of Lawrence Bates to the Approval of the Washington Mills Media."

At most, the evidence shows cooperation between three reputable firms to develop a manufacturing process, test and confirm the results and provide for supply of the satisfactory media. This is not a conspiracy.

It is true, and asserted by DeLong, that DeLong was "frustrated" because Washington Mills would not sell the P&W Specials at the lower price. After approval by Pratt, Washington Mills established its wholesale price for the P&W Specials and quoted its price to DeLong and the other distributors. This does not violate the antitrust laws.

In the absence of an agreement in restraint of the freedom to trade and in the absence of monopolistic power [neither of which is in this case], it is not a violation of the anti-trust laws to terminate a distributor even though the termination is because of the refusal of the distributor to accept or to "go along" with a pricing policy of the supplier. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Monsanto Co. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987).

DeLong's real complaint is not price fixing. The complaint is that Washington Mills would not sell its stock media to DeLong at stock prices, place the special designation required by Pratt on the boxes and ship it to Pratt.

Washington Mills did sell its stock media to DeLong at stock prices. This violated no anti-trust laws.

(2) There Was No Horizontal Conspiracy

Although DeLong asserts at page 37 of its brief that "two letters in the record would permit a jury to find a horizontal conspiracy", only one is identified, Pl. Ex. 88 [R. 4-80-Pl. Ex. 88]. "In addition", asserts DeLong at page 38, "the record includes a handwritten note by a WM officer recording a telephone cal from a competing distributor complaint of DeLong", citing Pl. Ex. 93 [R. 4-80-Pl. Ex. 93]. Neither of these exhibits, either alone or in conjunction with any other evidence, establish a horizontal conspiracy. (See discussion of this contention at p. 25, *supra.*

C. THE TRIAL JUDGE CORRECTLY APPLIED A RULE OF REASON ANALYSIS

This is a distributor termination case. The alleged conspiracy was between Washington Mills, a manufacturer, and one or more of its distributors. As such the restraint, if any, was vertical and not horizontal.

> Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.

Sharp, supra, 108, S.Ct. at 1519.

As pointed out above there is no evidence to support a finding that there was any agreement on price or price levels and, therefore, the alleged restraint was non price

in nature. Such restraint is not illegal *per se*. Whether it violates the Sherman Act is determined through application of the so-called rule of reason—that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Sharp, supra*, 108 S.Ct. at 1522-23.

DeLong now contends that the "conspiracy" was between Washington Mills and multiple distributors, and that this is horizontal in nature, and not vertical. Therefore, argues DeLong, the trial judge erred in applying a rule of reason analysis. Brief at 37-39.

This argument, in the absence of evidence of an agreement on price or price levels, was expressly rejected in *Sharp* when read in the context of *Monsanto*, as it must be. *Monsanto* teaches that, in distributor termination cases, complaints of multiple distributors alone is not sufficient. There must be evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. *Sharp* teaches that even such conscious commitment to the common scheme of terminating a "price cutting competitor" by a manufacturer and one distributor to terminate another distributor is not *per se* illegal in the absence of a further agreement to set prices at some level. It makes no difference whether the complaints come from only one or multiple distributors. The restraint (the termination) is vertical.

The trial judge properly applied the rule of reason.